75-5949

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SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

JAMES AVERY

75-5949

VS.

STATE OF NORTH CAROLINA

* *

MOTION TO FILE DELAYED PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

* *

TO THE HONORABLE CHIEF JUSTICE AND THE SEVERAL JUSTICES OF SUPREME COURT OF THE UNITED STATES:

Now comes the petitioner, James Avery, through his attorney, W. W. Pritchett, Jr., and moves the Court that pursuant to Rule 22 of the Rules of the Supreme Court of the United States and based on the information contained in the attached affidavit that he be allowed to file a delayed petition for a Writ of Certiorari with the Court.

This the 17 day of December, 1975.

PRITCHETT, COOKE & BURCH

By: W W Pritchett, Jr.
Attorney for Petitioner
P. O. Box 9
Windsor, North Carolina 27983
Telephone No. (919) 794-3161

PRITCHETT, COOKE & BURCH
ATTORNEYS AT LAW
WINDSOR, N. C.

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SUPREME COURT, U.S.

75-5949

File # _____

Film # _____

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NORTH CAROLINA

BERTIE COUNTY

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

James Avery

vs.

AFFIDAVIT

State of North Carolina

* *

I, William W. Pritchett, Jr., being duly sworn, depose and say:

1. I was appointed to represent the petitioner on October 8, 1973, by the District Court Judge for Bertie County, North Carolina.

2. Following a trial on its merits and the imposition of a sentence of death, the Judge Presiding appointed me to perfect the petitioner's appeal to the Supreme Court of North Carolina pursuant to the General Statutes of North Carolina.

3. The petitioner's conviction was sustained by the Supreme Court of North Carolina on March 12, 1975.

4. Pursuant to inquiry made by me on March 27, 1975, I was advised by the Administrative Office of the Courts for the State of North Carolina by letter dated April 2, 1975, from its director, Mr. Bert M. Montague, that it was the Administrative Office of the Court's position that representation of an indigent defendant does not require me to go beyond the Supreme Court and I would not be entitled to compensation for such representation.

5. The petitioner is confined in the Central Prison for the State of North Carolina at Raleigh, North Carolina, and to the best of my knowledge is without funds to pay for the preparation or the cost of a Petition for Certiorari to the United States Supreme Court.

6. On May 7, 1975, your affiant wrote the petitioner enclosing an affidavit of indigency necessary to proceed in forma pauperis with his petition for Writ of Certiorari to the United States Supreme Court. No reply was received from that letter. On May 22, 1975, your affiant again wrote the petitioner asking that he sign the affidavit of indigency and inquiring if the petitioner still wished to go forward with his petition to the United States Supreme Court to review his case. Again your affiant received no reply.

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WINDSOR, N. C.

7. On December 12th and again on December 16, 1975, I was directed by the Chief Justice of North Carolina acting through the Honorable Adrian J. Newton, Clerk of the Supreme Court of North Carolina, to file a Petition for Certiorari in the United States Supreme Court.

8. Pursuant to the directive of the Chief Justice of the State of North Carolina, I wish to petition the United States Supreme Court for a Writ of Certiorari, but am without funds or the means of acquiring funds to perfect such a petition. It is my belief that the petitioner comes within thepurview of 28 U. S. C. Sec. 1915 and I am entitled to proceed in forma pauperis with his petition.

PRITCHETT, COOKE & BURCH

By: W. W. Pritchett, Jr.

P. O. Box 9
Windsor, N. C. 27983
Telephone: (919) 794-3161

Sworn to and subscribed before me, this the 17 day of December, 1975.

Julia C. Hughes
Notary Public

My Com. Expires: 8-19-76.

(SEAL)

SUPREME COURT OF THE UNITED STATES

RECEIVED
DEC 22 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JAMES AVERY

VS.

STATE OF NORTH CAROLINA

75-5949

* *

MOTION TO PROCEED IN FORMA PAUPERIS

* *

TO THE HONORABLE CHIEF JUSTICE AND THE SEVERAL JUSTICES OF SUPREME COURT OF THE UNITED STATES:

Now comes the petitioner, James Avery, through his attorney, W. W. Pritchett, Jr., and moves the Court, pursuant to Rule 53 of the Rules of the Supreme Court of the United States that he be allowed to proceed and file a petition for Writ of Certiorari with the Court in Form Pauperis.

This the 17 day of December, 1975.

PRITCHETT, COOKE & BURCH

By: W W Pritchett Jr.
Attorney for Petitioner
P. O. Box 9
Windsor, North Carolina 27983
Telephone No. (919) 794-3161

PRITCHETT, COOKE & BURCH
ATTORNEYS AT LAW
WINDSOR, N. C.

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75-5949

DEC 22 1975

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

James Avery, Petitioner

vs.

PETITION FOR A WRIT OF CERTIORARI

State of North Carolina, Respondent

* *

W. W. Pritchett, Jr., your petitioner, prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of North Carolina entered in the case of State of North Carolina vs. James Avery on March 12, 1975.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina, printed in Appendix A hereto, infra, p.p. ___, is reported in 286 N.C. 459, 212 S. E. 2d 142 (1975).

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on March 12, 1975, as printed in Appendix A, infra, p. ___. The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1257 (3).

QUESTION PRESENTED

May the State confine an indigent defendant in jail for eight (8) days without appointing counsel or affording the defendant a hearing to determine his right to counsel?

Were the constitutional or statutory rights of the defendant abridged or violated by the trial Court, excusing a venireman who did not believe in capital punishment; allowing into evidence the defendant's alleged "in custody" confession; and imposing a sentence of death?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

1. Sixth Amendment to the United States Constitution, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

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2. Fourteenth Amendment to the United Constitution, "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

On September 30, 1973, a warrant was issued charging the petitioner with committing the capial felony of murder on September 29, 1973. The petitioner was arrested the night of September 29, 1973, and counsel was appointed October 8, 1973, prior to the preliminary hearing. At the February Term of Superior Court for Bertie County, North Carolina, the defendant entered a plea of not guilty and was tried upon the indictment of the Grand Jury.

During the voir dire of the jury, the following transpired between the Solicitor and Mrs. Tilgiham.

Q. And let me ask you this question. If you were satisfied from the evidence and beyond a reasonable doubt, would you vote for a verdict of guilty, realizing at the time you cast that vote that it would take this man's life?

A. No. It is kind of a hard question about taking a person's life. I would have to think that over. I would hate to do that.

Q. I am just asking you could you do that?

A. I could if I . . . you know . . . I would have to think first.

Q. Ma'am?

A. Well, I could, you know, but I have . . . it is a hard thought to say what I would say about taking a man's life.

Q. I am certainly not attempting to do anything except try to find out from you if you could and would do that.

A. I can't . . . .

Q. If you were satisfied from the evidence that the defendant was guilty of murder in the first degree, would you vote for a verdict of guilty realizing at the time that it would take his life?

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A. Well, it would be hard to take a person's life. It would be on my conscience.

Q. I just want you to tell me if you could or could not do that?

A. No, I don't feel like I could do that.

Q. Under any circumstances regardless of the facts in any case would you vote for a verdict, in any case that would take this man's life?

A. I wouldn't like to vote to take his life if I could help it.

Q. Well, are you opposed under all circumstances and conditions to capital punishment?

A. On the punishment, yes.

Q. I said are you opposed to capital punishment?

A. Well, yes.

Q. You are?

A. I think so as far as I know of taking his life.

Q. Your Honor, I submit this woman for cause.

COURT: All right. You may step down.

MR. PRITCHETT: Your Honor, the defendant will except to excusing this juror.

After the swearing of the jurors the defendant filed a written motion asking the charge against him be dismissed because his constitutional right had been violated.

It is stipulated between the State and the Petitioner that warrants charging the petitioner were issued September 30, 1973, and the next regular session of District Court in Bertie County was held October 30, 1973, but counsel was not appointed to represent petitioner by the District Court of Bertie County until October 8, 1973.

During an in custody interrogation of the petitioner at the Murfreesboro Police Department, the petitioner made an alleged confession. The petitioner was arrested at approximately 9:15 p.m. on September 29, 1973. The petitioner was then taken to the Murfreesboro Police Department where he was interrogated by Chief Robert B. Wheeler. The petitioner asked Chief Wheeler to allow him to make a telephone call, but Chief Wheeler refused petitioner's request. Chief Wheeler first wanted to get some information as to the petitioner's name, date of birth and address. The petitioner did not give Chief Wheeler the requested information and Chief Wheeler did not allow

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petitioner to make the requested call. The petitioner was interrogated by Agent William Earl Godley of the State Bureau of Investigation at approximately 1:10 a.m. After some general conversation the petitioner signed a waiver of counsel form. After talking to the petitioner approximately 45 minutes, the petitioner denied being involved in the robbery and murder that had taken place the night before. The room where the interrogation took place was approximately 12 feet by 12 feet and there was as many as eight police officers in the room at any one time. During the course of the interrogation Mr. Godley admitted raising his voice to the petitioner. Mr. Godley questioned the petitioner some 45 minutes and the petitioner denied throughout the questioning knowing anything about the crime he was being questioned about. Agent Godley left the room at approximately 2:45 and Sheriff Edward Daniels took over the questioning of the petitioner. After Sheriff Daniels had questioned the petitioner approximately five minutes, the petitioner made a full confession.

Upon a verdict of guilty the Judge Presiding sentenced your petitioner to death by the administering of lethal gas as provided by the Statutes.

REASONS FOR GRANTING THE WRIT

1. The decision of the North Carolina Supreme Court in State vs. Avery (Appendix A, infra, page ____) ignores the rule laid down in Witherspoon vs. Illinois, 391 U. S. 510, 88 Supreme Court 1770, 1968 and Sixth Amendment to the Constitution of the United States made applicable to the State by the Fourteenth amendment.

2. Failure to appoint counsel for your petitioner at the earliest practical time effectively denied him his right to counsel as provided by North Carolina General Statutes 7A-453, and the Sixteenth Amendment to the Constitution United States as applied to the States by the Fourteenth Amendment.

3. The introduction of the alleged confession made at the Murfreesboro Police Department after being denied an opportunity to communicate with friends and counsel via a telephone call effectively denies your petitioner his rights under the Sixth Amendment to the United States Constitution as applied to the State by the Fourteenth Amendment.

4. The imposition of a sentence of death violates the Eighth Amendment to the Constitution of the United States as applied to the State

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by the Fourteenth Amendment and is contrary to the Rule laid down in Furman vs. Georgia 408 U. S. 238 92 Supreme Court 2726 (1972). The decision in State vs. Waddell 282 N. C. 431, 194 S. E. 2d 19 (1973) 194 S. E. 2d 19 has replaced the discretion of the jury as to sentence of confinement or death with that of the District Attorney. Some men are allowed by the District Attorney to plead guilty to lesser offenses carrying sentences of confinement while others are sentenced to death. This element of discretion makes a sentence of death under our statutes and case law unconstitutional.

CONCLUSION

To make effective the guarantee of an accused's right to a fair and impartial trial under the Sixth Amendment and to protect an accused's right to counsel and to prohibit the imposition of crewel and unusual punishment, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

William W. Pritchett, Jr.

William W. Pritchett, Jr.
Counsel for Petitioner
P. O. Box 9
Windsor, North Carolina 27983

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 1975, I served a copy of the above Petition For a Writ of Certiorari by enclosing the same in a postpaid sealed envelope, properly addressed to

Mr. James Avery
N. C. Central Prison
North Morgan Street
Raleigh, North Carolina

Honorable Adrian J. Newton
Clerk Supreme Court
Post Office Box 2170
Raleigh, North Carolina 27602

Mr. Lester V. Chalmers, Jr., Esquire
Special Assistant Attorney General
Post Office Box 629
Raleigh, North Carolina 27602

PRITCHETT, COOKE & BURCH

By: W. W. Pritchett, Jr.
Attorney for Petitioner

PRITCHETT, COOKE & BURCH
ATTORNEYS AT LAW
WINDSOR, N. C.

APPENDIX A

OPINION AND JUDGMENT OF THE
SUPREME COURT OF NORTH CAROLINA
IN THE CASE OF STATE VS. JAMES AVERY

SUPREME COURT OF NORTH CAROLINA — SPRING TERM 1975

STATE OF NORTH CAROLINA)
VS.) No. 33 - Bertie
JAMES AVERY)

On an indictment proper in form, defendant was tried and convicted of the first degree murder of Carlton Woodrow Barham. Defendant appeals from a judgment imposing a sentence of death.

The testimony of Mrs. Nellie Ivy, a witness for the State, tends to show that on Saturday night, 29 September 1973, she was working part-time in Mr. Carlton Woodrow Barham's store just inside the city limits of Roxobel, N. C. She came to work about 5:30 p.m. At about 8:30 p.m., nearing closing time, she and Mr. Barham were alone in the store. She was standing near the cash register. Mr. Barham was proceeding toward the cash register from the back of the store where he had turned off the television. At this time, defendant came into the store with a hat over his hand. He removed the hat, uncovered a pistol, and said "This is a hold-up. Give me your money." She then told Mr. Barham, "For the Lord's sake, give it to him." Mr. Barham emptied his cash register and put the money in defendant's hat, saying that was all the money he had. Defendant ordered her and Mr. Barham out from behind the counter so he could check the cash register for himself. Defendant then took the money in the hat, started toward the door, and turned around. She said, "Please don't shoot us," at which time defendant shot at her, hitting her in the stomach. He was seven to ten feet from her and she could see him clearly. Defendant fired another shot over her at Mr. Barham. She heard a total of three shots after the shot that struck her. She also heard Mr. Barham cry out. Defendant then left the store. She waited until she heard a car leave and then dragged herself outside seeking help. She identified the defendant at trial as the man who robbed the store and shot her and Mr. Barham.

An autopsy conducted the following day disclosed that Mr. Barham died from massive hemorrhages in the abdominal area caused by a gunshot wound.

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Thomas James Bishop testified that he is a resident of Roxobel and that on the night in question he saw a dark-colored 1963 two-door Chevrolet with an antenna on the right rear run a stoplight at a high rate of speed about a mile down the road from Barham's store. The automobile was proceeding toward Murfreesboro. Bishop and Joe Herman then went down to Barham's store and saw Mrs. Ivy lying in the yard.

Deputy Sheriff Milton Morris testified that, based on Bishop's description of the automobile, the sheriff's office in Bertie County issued an alert at about 9:05 p.m.

Sergeant Robert E. Harris of the Murfreesboro Police Department testified that shortly after receiving the alert, he set up a traffic check at the west end of Murfreesboro. Within a few minutes, a car meeting the above description was signted. After some hesitation, the driver of the 1963 Chevrolet, who was alone, pulled over to the side of the road in response to Sergeant Harris's blue light and siren. The defendant was the driver. Sergeant Harris noticed that defendant was fumbling at his feet as Harris approached the driver's side of the automobile. Defendant was unable to produce an operator's license and the registration card showed the automobile to belong to one James F. Robertson. As Sergeant Harris was reaching for the registration card, which was located on the dash of the car, he saw the stock of a pistol protruding from beneath the seat of the automobile. The pistol was a .38-caliber Smith and Wesson revolver with four "spent" cartridges and two "live" cartridges in the chamber.

Sergeant Harris took defendant to the police station in Murfreesboro after giving him his Miranda rights. A search there revealed eleven other "live" .38-Caliber cartridges in defendant's right pocket and $136 in defendant's left pocket.

Sheriff Edward H. Daniels testified that shortly before 3:00 a.m. on the morning of 30 September 1973, defendant confessed to the robbery and murder after an interrogation of about one hour.

Special Agent Frank Satterfield of the State Bureau of Investigation testified that, in his opinion, the bullets taken from Mr. Barham's body had been fired from the revolver found in the 1963 Chevrolet driven by defendant.

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James F. Robertson testified that he was the owner of the 1963 Chevrolet driven by defendant and that it had been missing since the morning of 29 September 1973. He further testified that he did not give anyone permission to drive it and that he never owned a revolver nor kept one in his automobile.

Other law enforcement officers testified at various stages of the trial for corroborative purposes.

Defendant offered no evidence.

Other facts pertinent to decision are set out in the opinion.

Attorney General ROBERT MORGAN and Assistant Attorney General LESTER V. CHALMERS, JR. for the State.

WILLIAM W. PRITCHETT, JR. for defendant appellant.

MOORE, Justice.

Defendant first contends that he was deprived of his constitutional right to trial by an impartial jury when the trial judge allowed juror Tilgiham to be dismissed upon challenge for cause by the State. Defendant asserts that Mrs. Tilgiham's objections to the death penalty were general and that she therefore should not have been dismissed for cause, citing Witherspoon v. Illinois, 391 U. S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968).

During voir dire, the following transpired between the solicitor and Mrs. Tilgiham:

"Q. And let me ask you this question. If you were satisfied from the evidence and beyond a reasonable doubt, would you vote for a verdict of guilty, realizing at the time you cast that vote that it would take this man's life?

"A. No. It is kind of a hard question about taking a person's life. I would have to think that over. I would hate to do that.

"Q. I am just asking you could you do that?

"A. I could if I . . . you know . . . I would have to think first.

"Q. Ma'am?

"A. Well, I could, you know, but I have . . . it is a hard thought to say what I would say about taking a man's life.

"Q. I am certainly not attempting to do anything except try to find out from you if you could and would do that.

"A. I can't . . . .

"Q. If you were satisfied from the evidence that the defendant was guilty of murder in the first degree, would you vote for a verdict of guilty realizing at the time that it would take his life?

"A. Well, it would be hard to take a person's life. It would be on my conscience.

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"Q. I just want you to tell me if you could or could not do that?

"A. No, I don't feel like I could do that.

"Q. Under any circumstances regardless of the facts in any case would you vote for a verdict, in any case that would take this man's life?

"A. I wouldn't like to vote to take his life if I could help it.

"Q. Well, are you opposed under all circumstances and conditions to capital punishment?

"A. On the punishment, yes.

"Q. I said are you opposed to capital punishment?

"A. Well, yes.

"Q. You are?

"A. I think so as far as I know of taking his life.

"Q. Your Honor, I submit this woman for cause.

"COURT: All right. You may step down."

Since Witherspoon, this Court has consistently held that if a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. State v. Noell, 284 N. C. 670, 202 S. E. 2d 750 (1974); State v. Anderson 281 N. C. 261, 188 S. E. 2d 336 (1972); State v. Watson, 281 N. C. 221, 188 S. E. 2d 289 (1972); State v. Cook, 280 N. C. 642, 187 S. E. 2d 104 (1972); State v. Westbrook, 279 N. C. 18, 181 S. E. 2d 572 (1971), modified on other grounds, 408 U. S. 939, 33 L. Ed. 2d 761, 92 S. Ct. 2873 (1972); State v. Atkinson, 275 N. C. 288, 167 S. E. 2d 241 (1969), modified on other grounds, 403 U. S. 948, 29 L. Ed. 2d 859, 91 S. Ct. 2283 (1971).

Whether a juror evidences absolute opposition to the death penalty so as to be excludable for cause under Witherspoon is a difficult question subject to seemingly inconsistent results on similar facts. See Annot., 39 A.L.R. 3d 550 (1971). We are aware of numerous decisions in other jurisdictions upholding challenges for cause on answers more equivocal than those of juror Tilgiham. See, e.g., Paramore v. State, 229 So. 2d 855 (Fla. 1969), modified on other grounds, 408 U. S. 935, 33 L. Ed. 2d 751, 92 S. Ct. 2857 (1972); Williams v. State, 228 So. 2d 377 (Fla. 1969), modified on other grounds, 408 U. S. 941, 33 L. Ed. 2d 765, 92 S. Ct. 2864 (1972); State v. Conyers, 58 N. J. 123, 275 A. 2d 721 (1971); State v. Elliott, 25

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Ohio St. 2d 249, 54 Ohio Ops. 2d 371, 267 N. E. 2d 806 (1971), modified on other grounds, 408 U. S. 939, 33 L. Ed. 2d 761, 92 S. Ct. 2872 (1972); Koonce v. State, 456 P. 2d 549 (Okla. Crim. 1969), modified on other grounds, 408 U. S. 934, 33 L. Ed. 2d 748, 92 S. Ct. 2845 (1972); Tezeno v. State, 484 S. W. 2d 374 (Tex. 1972). We are also aware that a substantial number of death penalty cases have been reversed on the authority of Witherspoon in memorandum opinions by the United States Supreme Court. For a partial list, see Tezeno, id. at 383.

In State v. Noell, 284 N. C. 670, 202 S. E. 2d 750 (1974), we held that a prospective juror, Mrs. Rogers, was properly excused for cause after answering questions concerning her belief as to capital punishment as follows:

"MR. PIERCE [the solicitor]: And Mrs. Rogers, let me ask you the same question, that I have been asking. Would it be impossible for you to bring in a verdict requiring the imposition of the death penalty, under any circumstances, no matter—even though the State proved to you the defendant's guilt beyond a reasonable doubt?

JUROR ROGERS: I do not believe in capital punishment.

MR. PIERCE: Let me ask you this question, again, with your answer in mind, please. Would it be impossible to bring in a verdict that required the imposition of the death penalty, no matter what the State showed you, by way of the evidence?

JUROR ROGERS: I think so.'"

While it is clear that Mrs. Tilgiham, the prospective juror in this case, encountered some difficulty formulating answers to the questions, the solicitor was diligent in seeking to help the juror clarify her position. The solicitor stated that he was seeking by his questions only to find out, under Witherspoon, if the juror could or could not render a guilty verdict, the consequences of which would be death to the defendant. We believe the juror clarified her position to the extent that it was clear that she would refuse to return a guilty verdict regardless of the evidence. This is shown by her other answers, as well as by the following exchange:

"Q. If you were satisfied from the evidence that the defendant was guilty of murder in the first degree, would you vote for a verdict of guilty realizing at the time that it would take his life?

"A. Well, it would be hard to take a person's life. It would be on my conscience.

"Q. I just want you to tell me if you could or could not do that?

"A. No, I don't feel like I could do that."

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As the Texas Court of Criminal Appeals said in Tezeno:

"We cannot believe that Witherspoon . . . requires certain formal answers and none other. We surely feel that the test of Witherspoon is 'not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. [Citation omitted.]'" 484 S. W. 2d at 383.

We think that, reading the juror's answers as a whole, she displayed an unequivocal reluctance to render a guilty verdict, knowing that defendant would be subjected to the death penalty. Furthermore, the record does not disclose that the State had exhausted its nine peremptory challenges, and had this challenge for cause not been sustained, the solicitor could have challenged this juror peremptorily.

This assignment is overruled.

Defendant next contends that the trial court erred in allowing into evidence the defendant's in-custody confession.

A voir dire hearing was held to determine the admissibility of the confession. On voir dire, special Agent William Earl Godley of the State Bureau of Investigation testified that he read the defendant his rights at the Murfreesboro Police Station as follows:

"Before I ask you any questions, you must understand your rights. You have the right to remain silent and not make any statement. Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice before you answer any questions and to have him or anyone else with you during questioning. If you cannot afford a lawyer, one will be appointed for you by the Court before any questioning, if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer."

Defendant, a high school graduate, testified on voir dire that he had been taken into custody three times before and that he understood his rights. He signed a written waiver of those rights at about 1:55 a.m. Defendant testified that "nobody mistreated me," that he knew and understood his rights, and that he had a Coca-Cola and was allowed to smoke. After a thorough voir dire hearing, covering eleven pages in the record, the trial court concluded that the defendant freely, understandingly and voluntarily made the statement to Sheriff Daniels without undue influence, compulsion and duress and without promise of leniency, and that defendant's constitutional rights had not been abridged in any way. Such conclusions, when supported by competent evidence, are conclusive on appeal. State v. Thompson, 285 N. C. 181, 203 S. E. 2d 781 (1974); State v. Crews, 284 N. C. 427, 201 S. E. 2d 840 (1974); State v. Fraizer, 280 N. C. 181, 185 S. E. 2d

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652 (1972); State v. Hill, 276 N. C. 1, 170 S. E. 2d 885 (1969).

Defendant earnestly contends, however, that the confession was rendered incompetent due to an incident which occurred between him and Police Chief Wheeler earlier in the evening on 29 September at the police station.

Upon being arrested and placed in the police car around 9:15 p.m., defendant was read his rights. After arriving at the station, defendant asked to make a telephone call. Police Chief Wheeler told defendant he could make the telephone call after he gave the officers his name, date of birth and address. Defendant refused to give that information and was not allowed to make a telephone call at that time. Chief Wheeler testified that he needed the name of the defendant so he could complete his legal papers, draw a warrant promptly (as required by G. S. 15-47), and keep his phone log up to date as required by city regulations. He further testified: "The city requires me to make a log of each call that is made and who makes the call. If he had told me who he was, I would have let him make the call. I did not try to keep him from making the call but I had to know who he was going to call so I could log it." The information sought by Chief Wheeler was harmless to defendant yet necessary to the police in performing clerical duties accompanying arrest.

Later that night Sheriff Daniels of Bertie County took charge of the investigation. Sheriff Daniels recognized defendant as being one of the Avery boys from Lewiston whom he had arrested before. The sheriff was present when defendant was advised of his rights by Agent Godley and when defendant signed the waiver of those rights. After the waiver was signed, Agent Godley left and Sheriff Daniels, after again reminding defendant of his rights, asked him if it would be all right if he talked to him without a lawyer being present. Defendant replied that this would be all right. Defendant did not request to use the telephone that night although the sheriff told him that there was a telephone available if there was anyone he wanted to call. Under these facts, we do not feel that the refusal of Chief Wheeler to allow defendant to make a telephone call until he gave the officer his name, date of birth and address was such prejudicial error, if error, as to require a new trial. Especially so when shortly thereafter, and before making any incriminating statement, defendant was told by the sheriff that a telephone was available if he desired to use it. At that time defendant did

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not request to make a telephone call but told the sheriff he did not want an attorney or anyone else present at that time and if he decided to get an attorney he would get one himself later on.

Assuming, without deciding, that it was error for Chief Wheeler to refuse to let defendant make the telephone call when he first requested to do so, we believe that under the facts in this case it, at most, would be harmless error. As stated in State v. Taylor, 280 N. C. 273, 280, 185 S. E. 2d 677, 682 (1972):

"Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 A.L.R. 3d 1065 (1967); Harrington v. California, 395 U. S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. Fahy v. Connecticut, 375 U. S. 85, 11 L. Ed. 2d 171, 84 S. Ct. 229 (1963)."

In the present case defenant was positively identified by Mrs. Ivy who was present and who was also shot by defendant and who saw defendant shoot deceased. A car was seen leaving the vicinity of the shooting at a high rate of speed shortly after the shooting occurred. Soon thereafter, a car of the same description being driven by the defendant was stopped. A pistol was found in the car with four spent cartridges and two live ones. Mrs. Ivy testified that three shots were fired after the one which struck her. A ballistics expert testified that the bullets which killed deceased were fired from the pistol found in defendant's possession in the car stolen from Mr. Robertson. Eleven live cartridges for the same caliber pistol and $136 in cash were found in defendant's pockets. A hat similar to the one which defendant had over the pistol when he first entered the store was also found in the car which defendant was driving. In view of this overwhelming evidence of defendant's guilt, we hold that the failure to allow defendant to make the telephone call as first requested, when he was allowed the opportunity to do so shortly thereafter, and before making any incriminating statement, was harmless beyond a reasonable doubt. We do not believe there is a reasonable possibility that this failure contributed to defendant's conviction. See State v. Castor, 285 N. C. 286, 204 S. E. 2d 848 (1974); State v. Frank, 284 N. C. 137, 200 S. E. 2d 169 (1973); State v. Humphrey, 283 N. C. 570, 196 S. E. 2d 516 (1973).

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Defendant next contends that his constitutional and statutory rights were violated by virtue of his being confined in jail for eight days without appointment of counsel.

Defendant was arrested about 9:15 p.m. on 29 September 1973. He was taken to the Murfreesboro Police Department where he signed a written waiver of his rights at about 1:55 a.m. He made a full confession about 3:00 a.m. on 30 September. Counsel was appointed for defendant in District Court on 8 October 1973. Sheriff Daniels testified on voir dire that at no time during the week preceding 8 October did defendant request that counsel be appointed for him. Daniels further testified that defendant told him that he could get his own attorney through connections he had in Washinton, D. C. Defendant testified on cross-examination during voir dire that he told police officers he could get his own attorney and that he did not want appointed counsel. He testified that he told officers this on Monday, Tuesday and Wednesday, following his confession on Sunday morning, and that he was given appointed counsel as soon as he discovered he could not employ his own attorney. This contention is without merit.

Defendant asserts that he was deprived of his constitutional right to the presence of counsel during these eight days, and cites State v. Hill, 277 N.C. 547, 178 S.E. 2d 462 (1971), and State v. Pearce, 266 N.C. 234, 145 S. E. 2d 918 (1966), in support of his argument. Defendant's reliance is misplaced. In Hill, defendant was held to be unconstitutionally deprived of his right to counsel when his counsel, who had been summoned, was refused permission to see him. In this case, defendant was offered an opportunity to contact counsel, and he assured the officers he would seek his own counsel to assist him. In Pearce, defendant was held for two months before counsel was appointed, during which the officers elicited much damaging testimony from him. In that case, lack of presence of counsel was but one factor among several which induced this Court to rule the admissions of defendant to be involuntary. At no time in that case did the defendant assure the officers he would procure his own counsel. In the present case defendant continued to assure the officers that he intended to employ private counsel. Under these circumstances, we hold that defendant's constitutional rights were not violated by the eight days' delay in appointment of counsel.

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Defendant contends specifically, however, that his rights under G. S. 7A-453 and G. S. 15-47 were violated by the eight days' delay in appointing counsel for him. Pertinent parts of those statutes are as follows:

"G. S. 7A-453. Duty of custodian of a possibly indigent person, determination of indigency. — . . . . . .

"(b) In districts which do not have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court. The clerk shall make a preliminary determination as to the person's entitlement to counsel and so inform any district or superior court judge holding court in the county. The judge so informed may assign counsel. The Court shall make the final determination.

"(c) In any district, if a defendant, upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the defender or the clerk of superior court, as the case may be, who shall take action as provided in this section.

"(d) The duties imposed by this section upon authorities having custody of persons who may be indigent are in addition to the duties imposed upon arresting officers under G.S. 15-47."

"G.S. 15-47. Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends. — . . . . . [A]nd it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied." (Repealed by Chapter 1286, Session Laws 1973, effective July 1, 1975.)

In this case, all the evidence is to the effect that defendant told the officers he intended to procure his own attorney through friends in Washington, D. C. He continued to tell the officers this for several days after his arrest. When it first became apparent that he was unable to secure such attorney, an attorney was appointed to represent him without further delay. As stated in State v. McCloud, 276 N.C. 518, 531, 173 S. E. 2d 753, 763 (1970):

"The failure to observe the provisions of these statutes may well result in the violation of a person's constitutional rights. However, G.S. 15-46 and G.S. 15-47 do not prescribe mandatory procedures affecting the validity of a trial. State v. Broome, 269 N.C. 661, 153 S.E. 2d 384, Carroll v. Turner, 262 F. Supp. 486 (E.D.N.C. 1966)."

Defendant, both by words and acts, waived his right to earlier appointment of counsel. No violation of the quoted statutes is shown. This assignment is overruled.

Defendant finally contends that his constitutional and statutory rights were violated by the imposition of the death penalty. The defendant's contentions with respect to the validity of the death sentence have been carefully considered and found to be without merit by this Court in a number of recent decisions. State vs. Noell, supra, State v. Jarrette, 284 N.C. 625,

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202 S.E. 2d 721 (1974), State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973). No useful purpose would be served by further discussion here. This assignment is overruled.

In view of the seriousness of the charge and gravity of the punishment imposed, we have carefully examined each of defendant's assignments of error. An examination of the entire record discloses that the defendant has had a fair trial free from prejudicial error.

No error.

EXUM, Justice, dissents from that protion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion filed this day in State v. Williams, 286 N.C. 422, 212 S.E. 2d — (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

SHARP, Chief Justice, dissenting as to the death penalty:

The murder for which defendant was convicted occurred on 29 September 1973, a date between 18 January 1973, the day of the decision in State v. Waddell, 282, N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. § 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in State v. Jarrett, 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974) — an opinion in which Justice Higgins and I joined —, I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. See also the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in State v. Waddell, supra, 282 N. C. at 453 and 476, 194 S.E. 2d at 30 and 47.

COPELAND, Justice, dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v. Williams, 286 N.C. 422, 212 S.E. 2d—.

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Supreme Court, U. S.
FILED
JAN 23 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

No. 75-5949

****

JAMES AVERY,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

****

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA

****

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IN THE SUPREME COURT OF THE UNITED STATES

No. 75-5949

****

JAMES AVERY,)
)
Petitioner)
)
v.)
)
STATE OF NORTH CAROLINA,)
)
Respondent)

****

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA

****

Petitioner has moved for this Writ of Certiorari to Review the judgment of the Supreme Court of North Carolina entered on March 12, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at 286 NC 459, 212 SE2d 142 (1975) and is appended to Respondent's response as Appendix A-1.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. WHETHER THE DELAY OF EIGHT DAYS FROM TIME OF PETITIONER'S ARREST UNTIL TIME OF APPOINTMENT OF COUNSEL BY THE COURT, UNDER THE FACTS OF THIS CASE, CONSTITUTES A DENIAL OF PETITIONER'S SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL?

2. WHETHER THE NORTH CAROLINA PROCEDURE FOR JURY SELECTION IN CAPITAL CASES, AS APPLIED IN THE PETITIONER'S CASE, VIOLATES THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE MANDATE OF THE SUPREME COURT IN THE CASE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

3. WHETHER ALLOWING INTO EVIDENCE THE PETITIONER'S "IN CUSTODY" CONFESSION, UNDER THE FACTS OF THIS CASE CONSTITUTE A DENIAL OF PETITIONER'S RIGHTS TO ASSISTANCE OF COUNSEL AND TO A FAIR AND IMPARTIAL TRIAL GUARANTEED UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

4. WHETHER THE IMPOSITION AND EXECUTION OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. This case involves North Carolina General Statutes §14-17, 15-187, 15-188, 9-15 and 7A-450.

STATEMENT OF CASE

Petitioner, James Avery, on a plea of not guilty, was tried and convicted of first degree murder at the February, 1974, Session of the Superior Court of Bertie County, North Carolina. The petitioner was sentenced to die under North Carolina General Statutes 14-17. Petitioner appealed his conviction to the North Carolina Supreme Court which, in its opinion, filed March 12, 1975, affirmed petitioner's conviction and death sentence. Petitioner now seeks review in this Court upon Petition for Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

STATEMENT OF FACTS

In the course of the trial State offered testimony as follows:

Dr. D. E. Scarborough testifitd for the State as follows:

That he conducted an autopsy on the body of Mr. Barham sometime the following day on Sunday, September 30th, and that in his opinion the cause of death

was massive hemorrhage from large blood vessels in the area of the abdomen as a result of injuries from the gunshot wound.

That there was a total of five shots or five holes in the body from three bullets. That he found two bullets in the body, and that one of the bullets had gone through and exited the body. That in his opinion the bullet marked "A" was the one that caused the fatal injury

Mrs. Nellie Ivey testified for the State as follows:

That on Saturday night of September 29, 1973, she was working parttime in Mr. Carlton Woodrow Barham's store on the edge of the city limits of Roxobel in Bertie County. That about 8:30 p.m. on this night, she and Mr. Barham were alone in the store, it being about time to close up, and she was standing by the cash register and Mr. Barham was at the back cutting off the television, and thereafter Mr. Barham came up to where she was. That the defendant, Mr. James Avery, came in and that he had a hat over his hand, and that he took the hat off of his hand and had a pistol, which they saw, and he said, "This is a hold-up. Give me your money." (Rp.36). That she told Mr. Barham, "For God's sake, give it to him." That the defendant said, "Hurry up and put it in the hat." That Mr. Barham got the money out of the cash register and put it in the hat and said, "This is all I've got." That the defendant had the gun on him during this time, and made them get out from behind the counter, and he went behind the counter and felt in the cash register himself. That he then took the hat with the money in it and started toward the door, meanwhile holding the gun on them. That she said, "Please don't shoot us." That he shot her in the stomach at a distance of some seven to ten feet, and she fell and the first shot was fired over her, and then he ran and jumped over her toward the back of the store, and she heard him fire another shot, and at that

time Mr. Barham hollered and it sounded like he was about halfway toward the back of the store from the back to the front of the store and then there was another shot for a total of four shots. That then he came back over her and went out of the door. That she waited until she heard a car speed away and then she could not get up. That she dragged herself outside and called for help and two men came up in a car and said that they would help.

Thomas James Bishop testified for the State as follows:

That he saw a 1963 Chevrolet two-door automobile which was dark in color and had an aerial on the right back, which failed to stop at a stop sign in the town of Roxobel, and it was headed from the direction of Mr. Barham's store, and that it sped off towards Rich Square on Highway 258.

Milton Morris testified for the State as follows:

That on the 29th day of September, 1973, he was a deputy sheriff for Bertie County. That Mr. Bishop told him that he observed a dark 1963 model car with an antenna on the back passing the Esso Station. That Mr. Bishop said the antenna was on the right-hand side of the car on the rear. That the car came out of the road from Mr. Barham's store to Roxobel and failed to stop at the stop sign. That the car was going at a high rate of speed and headed west of 308 toward Rich Square. As a result of his conversation with Mr. Bishop he put out the description on the radio and that in a few minutes, he received word from Murfreesboro in connection with this car.

Robert E. Harris testified for the State as follows:

That on the 29th day of September, 1973, he was a police officer for the Town of Murfreesboro. That the defendant was stopped by him at approximately 9:10 or 9:15 driving a 1963 automobile, a two-door dark brown Chevrolet

with an antenna on the right rear, and when he came to the car he saw the defendant with his head and his hands down toward his feet, and he arrested the defendant for having no driver's or operator's license, and when he was patting him down, he found a .38 bullet in his pocket. That he then went back to the car and saw a .38 caliber Smith and Wesson revolver partially under the seat and in the revolver were four spent rounds and two live rounds of .38 caliber ammunition. That he took the defendant to the police station in Murfreesboro, and there found in his right front pocket eleven .38 caliber pistol bullets and eighty-four cents in change and $136.00 in bills in his left front pocket. That at approximately 2:45 on September 30, 1973, as a result of questioning the defendant told Sheriff Daniels that he had found the car on the side of the road in the vicinity of Roxobel, and that the pistol was under the seat, and he needed money to get back to Washington, D.C., and that he decided to rob a store, but he did not know Mr. Barham and he went in with the gun in his hand and said, "This is a stick-up." That the man gave him the money and said that was all of the money he had, but he saw the man go for a gun on the shelf under the cash register. That when he shot the man, the woman grabbed him by the arm and that was when she was shot. That he told the Sheriff he shot four times, and as a result of what the defendant said, they went back to the car and got a hat and shirt from the car.

Robert B. Wheeler testified for the State as follows:

That on the 29th day of September, 1973, he was Chief of Police of the Town of Murfreesboro; that he saw the defendant at approximately 9:15 p.m. and that he was getting out of a 1963 Chevrolet two-door automobile. That he saw officer Harris take a pistol out of the car (State's Exhibit 16). That Sgt. Harris handed the gun to him and that it had

four (4) spent cartridges in the cylinder and two live rounds of .38 special ammunition. That the defendant refused to tell him his name.

William Earl Godley testified for the State as follows:

That he is a special agent with the State Bureau of Investigation. That on the 29th day of September, 1973, he saw Chief Wheeler and Sgt. Harris. That Chief Wheeler handed him a pistol and four empty .38 caliber bullets together with two live rounds and that he turned these over to Special Agent Frank Satterfield together with the bullets marked State's Exhibits Nos. 4 and 5. That he talked with the defendant and advised him of his constitutional rights and that the defendant signed a waiver of these rights. (State's Exhibit No. 19)

Edward H. Daniels, Sheriff of Bertie County, testified for the State as follows:

That he was present when Mr. Godley advised the defendant James Avery of his constitutional rights, shown on State's Exhibit No. 19. That after talking to the defendant for approximately five minutes concerning the murder and armed robbery and the assault in Roxobel and questioning about the car that he was driving when he was stopped by the Murfreesboro Police Department, he said he might as well tell the truth about it. That Sheriff Daniels said, "All right." The defendant then told him that he found this car on the road on Highway NO. 11 somewhere near Aulander sitting on the shoulder of the road with the motor running, and he got in the car and started driving and riding around. That he needed some money to get back to Washington, D.C. and he had to get it somewhere. That he decided to rob this store in Roxobel and he did not know Mr. Barham or anyone else in the store. That he went in the store with the gun in his hand and told Mr. Barham that it was a hold-up and to give him the money. Mrs. Ivey said, "Go ahead and give him the money." Mr. Barham

got the money and handed it to him in a hat that he had in his hand. The defendant said the man told him that was all, but he started to reach for a gun. The defendant further told Sheriff Daniels that the man said that was all of the money he had, but, "I saw his hand go toward the gun that was on the shelf under the cash register, and that is when I shot him. The woman grabbed me by the arm." Sheriff Daniels further testified that the defendant said he shot the gun four times. He said that when he went into the store he had a hat, a beach-type hat over the hand that the gun was in. He said the money was put in the hat. Sheriff Daniels testified that he found this hat in the automobile at the police department. The car was a 1963 Chevrolet with an antenna on the rear. The defendant said he found the gun under the seat of the car but he did not tell Sheriff Daniels anything about the eleven .38 caliber cartridges found in his pocket.

Frank Satterfield, Special Agent for the State Bureau of Investigation, testified as follows:

That he examined the pistol, State's Exhibit No. 16, and the four spent shells and the two live rounds found in the said pistol and the two bullets which had been taken from the body of Mr. Barham, and made several tests including a firing or test firing of the pistol, and based thereon, it was his opinion that the two bullets taken from Mr. Barham's body had been fired from the pistol, State's Exhibit NO. 16, and that the four fired cartridge cases, which had been found in State's Exhibit No. 16, the pistol, had been fired in that pistol.

Mrs. Nellie Ivy was recalled by the State and testified as follows:

That she did not see Mr. Barham attempt to reach for a gun. That when Mr. Barham came out from behind the counter, he did not have anything in his hands. That the defendant held a gun on them and went behind the counter. That there was a gun behind the counter when the defendant went back there.

That the gun could not be seen unless you go behind the checkout counter. Mrs. Ivy further testified that the person that shot her and robbed the store and shot Mr. Barham was sitting beside his attorney with a No. 10 football jersey on.

James F. Robertson testified for the State as follows:

That he was the owner of a 1963 Chevrolet Impala automobile, Serial No. 31847B18239. That it was a two-door and dark brown in color with a radio aerial on the back right fender. That State's Exhibit No. 12 was a picture of that automobile. That the car was in his possession on September 29, 1973, and that he parked that car in South Hills, Virginia, about five minutes to eight a.m. That he next saw the car on Monday, October 1, 1973, when he came to Windsor. That he did not give anybody permission to drive his car and particularly did not give the defendant, James Avery, permission to drive his car. That State's Exhibit No. 14 was the registration card to the vehicle. That he had never seen State's Exhibit No. 16 before and that he had never held it in his hand before. The witness further testified that he had never owned a pistol in his life and that there was no pistol in his car on September 29, 1973.

Milton Morris was recalled by the State and testified as follows:

That he was with Sheriff Daniels in Murfreesboro when he heard the defendant advised of his rights by State Bureau of Investigation Agent Godley. That the defendant also read the waiver, and that he saw Mr. Avery sign the waiver. He further testified that the defendant said he found a 1963 dark brown Chevrolet on N.C. 11 near Aulander. That it was sitting on the shoulder of the road with the motor running. The defendant said he got in it and started

riding around and was broke and needed some money to get back to Washington, D.C. and he said he went to Mr. Barham's store. He said he did not know Mr. Barham but he just needed some money and he just picked this store at random. He said he went in the store with the gun and told them it was a hold-up and to put the money in the hat. The defendant said Mr. Barham took the money out of the cash register and put it in the hat and that he asked them both to come out from behind the cash register and he went back and reached in and looked to see if there was any more money there and Mr. Barham told him that was all he had. The defendant said he saw Mr. Barham reach down to go for the pistol and that is when he shot Mr. Barham. Mrs. Ivy grabbed his arm and that is when he shot her. The defendant said he then got in the car and went to Rich Square. The witness further testified that the defendant told him he got the money that is shown as State's Exhibit No. 18 in the sum of $136.84 from Barham's store.

The State rested and the defendant offered no evidence.

ARGUMENT

1. THE DELAY OF EIGHT DAYS FROM TIME OF PETITIONER'S ARREST UNTIL TIME OF APPOINTMENT OF COUNSEL BY THE COURT, UNDER THE FACTS OF THIS CASE, DOES NOT CONSTITUTE A DENIAL OF PETITIONER'S SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL.

The record on appeal and the opinion of the Supreme Court of North Carolina make it clear that upon arrest the petitioner was read his Miranda rights, that he understood his right to counsel including his right to appointed counsel if he were indigent, that at all times petitioner maintained that he would get his own lawyer and that at no time during the week preceeding October 8th did petitioner indicate he wanted or needed an appointed lawyer.

The delay in appointment of State-paid counsel for petitioner was induced by his own representation that he would have retained counsel arranged through friends in Washington, D.C. As soon as his representations that he could retain counsel ceased, State-paid counsel was appointed for petitioner as an indigent pursuant to North Carolina General Statutes §7A-450, et seq.

Petitioner could have had appointed counsel upon arrest merely by indicating his own indigency or his inability to obtain counsel to any officer having him in custody. That officer then would have had a statutory obligation to bring the matter to the attention of the Clerk of Superior Court who would have taken steps to have counsel promptly appointed. N.C.G.S. 7A-453.

Petitioner by his actions and statements caused the delay of which he now complains. He ought not be permitted to now assert as error the ommission he caused to occur.

The delay in appointment of counsel was not the source of any loss of any constitutional right by petitioner. Indeed, no damage at all occurred to petitioner by reason of the postponed appointment.

2. THE NORTH CAROLINA PROCEDURE FOR JURY SELECTION IN CAPITAL CASES, AS APPLIED IN THE PETITIONER'S CASE, DOES NOT VIOLATE THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE MANDATE OF THE SUPREME COURT IN THE CASE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner contends that the mandate of Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed2d 776, 88 S.Ct. 1770 (1968) was ignored by the trial judge and by the Supreme Court of North Carolina. The State urges on the contrary that the courts of North Carolina have carefully and judiciously adhered to the Witherspoon guidelines with questions of doubt being resolved in favor of the defendant. State v. Britt, 285 NC 256, 204 SE2d 817 (1974).

The State urges that here the witness though somewhat inarticulate was clear and unequivocal in her answers that she could not vote for a verdict of guilty if it meant that such a verdict would take the petitioner's life. She said in successive answers: "I can't... ."; "No, I don't feel like I could do that."; and "I wouldn't like to vote to take his life if I could help it."

The State urges that when jurors are non-lawyers that answers to Witherspoon type questions cannot be expected to meet any formalistic or mechanical criteria but must be examined in context to ascertain the firmness of the juror's resolve and depth of conviction against the death penalty under any circumstances. It is clear, the State urges, that the juror was unequivocal and firm in her belief that she could not vote for a guilty verdict under any circumstances where such a verdict would result in imposition of the death penalty.

3. ALLOWING INTO EVIDENCE THE PETITIONER'S "IN CUSTODY" CONFESSION, UNDER THE FACTS OF THIS CASE DOES NOT CONSTITUTE A DENIAL OF PETITIONER'S RIGHTS TO ASSISTANCE OF COUNSEL AND TO A FAIR AND IMPARTIAL TRIAL GUARANTEED UNDER THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The statement by petitioner to Sheriff Daniels was made after the Miranda warning was given and petitioner had signed a written waiver acknowledging he understood his rights. The trial court held an extensive voir dire inquiry into the voluntariness of petitioner's statement and made findings of fact and conclusions to the effect that petitioner had "freely, understandingly and voluntarily made the statement to Sheriff Daniels without undue influence, compulsion and duress and without promise of leniency". The trial court concluded and the Supreme Court affirmed that petitioner's rights had not been abridged in any way. When supported by competent evidence, as they are here, such conclusions are conclusive on appeal. State v. Thompson, 285 NC 181, 203 SE2d 781 (1974).

Petitioner contends that denial by Chief Wheeler of the use of a telephone by petitioner until petitioner gave Chief Wheeler his name, date of birth and address constituted a denial of his constitutional rights under the Sixth Amendment. Chief Wheeler made the giving of that clerical information by petitioner a condition of using the telephone to call friends. Shortly thereafter and before the defendant made any incriminating statement, Bertie County Sheriff Daniels came in and recognized the petitioner and told petitioner a telephone was available if he wanted to use it. Petitioner did not use the telephone then and told the Sheriff he did not want an attorney or anyone else present and if he decided to get an attorney he would get one himself later on.

The State urges that in these circumstances withholding the telephone use from a person arrested until he has given to law enforcement officers minimal basic clerical data such as him name, date of birth and address is not error. Under the facts of this case it is clearly not prejudicial error especially in light of (1) the positive identification by a witness-victim, (2) identity of car in which the defendant was found, (3) identification of the pistol found in the car with defendant upon his arrest as the one which fired the fatal shots and (4) the fact that the hat found in the car matched the description of the hat used in the robbery. State v. Castor, 285 NC 286, 204 SE2d 848 (1974).

The facts and the trial court's findings of fact and conclusions of law establish clearly that there was no likelihood of any taint occasioned by the telephone incident which could have affected the trial result.

4. THE IMPOSITION AND EXECUTION OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF NORTH CAROLINA DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

There is no valid reason for the Court to grant Certiorari at this time to hear this question. This Honorable Court in the case of Fowler v. North Carolina, No. 73-7031 (October Term, 1974) granted Certiorari to Petitioner Jesse Thurman Fowler to hear this identical question. Extensive briefs have been submitted in that case, oral arguments were made before this Honorable Court on April 21, 1975, and additional oral argument has been scheduled for a later term of this Court. This question, therefore, has been presented and has been accepted for hearing by the Court. Oral arguments before this Court have already been made and further oral arguments are scheduled to be made. Therefore, any decision in this case should be dependent on the outcome of the Fowler case and the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons stated above, this Writ of Certiorari should not be issued to review the judgment of the Supreme Court of North Carolina.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES TO REVIEW THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA upon the petitioner by depositing the same in the United States Mail, postage prepaid, addressed to:

Mr. William W. Pritchett, Jr.
Attorney at Law
Pritchett, Cooke & Burch
P. O. Box 9
Windsor, North Carolina 27983

This the 20th day of January, 1976.

RUFUS L. EDMISTEN
Attorney General

Sidney S. Eagles, Jr.
Special Deputy Attorney General

law which will erode constitutional safeguards jealously guarded by this Court for nearly a century and a half.

We would not be understood to hold that our ruling on the admissibility of the oral and written confessions obtained by police officers on 9 October 1973 is intended necessarily to vitiate the apparently volunteered statements made to Deputy Sheriff Ray Starling on 10 October 1973. At the next trial the admissibility of these statements should be determined by the trial judge after a *voir dire* hearing. *See State v. Godwin*, 216 N.C. 49, 3 S.E. 2d 347; *State v. Lowry*, 170 N.C. 730, 87 S.E. 62; 2 D. Stansbury, North Carolina Evidence § 185 (Brandis Rev.).

We do not deem it necessary to consider at length defendant's assignment of error concerning the argument of the district attorney. Suffice it to say that arguments which refer to the failure of defendant to testify are disapproved. *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106, *rehearing denied*, 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed. 2d 730; *State v. Roberts*, 243 N.C. 619, 91 S.E. 2d 589; *see* Annotation, 24 A.L.R. 3d 1093.

Neither do we see prejudicial error in the admission of defendant's negative answer to S.B.I. Agent Windham's question, "What's the matter Frank, are you sick about what you did?" We simply note in passing that this question and answer could have added little to the State's case.

For the reasons stated, there must be a

New trial.

STATE OF NORTH CAROLINA v. JAMES AVERY

No. 33

(Filed 12 March 1975)

1. Constitutional Law § 29; Criminal Law § 135; Jury § 7— prospective jurors — death penalty views — challenge for cause

The trial court in a capital case did not err in the allowance of the State's challenge for cause of a prospective juror whose answers to questions by the solicitor, when read as a whole, made it clear that she would refuse to render a guilty verdict regardless of the evidence.

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2. Arrest and Bail § 7; Criminal Law § 75 – refusal to allow phone call — subsequent confession — harmless error

In this first degree murder prosecution, refusal of the chief of police to allow defendant to make a phone call until he gave the officer his name, date of birth and address, if erroneous, was harmless beyond a reasonable doubt where, shortly thereafter and before making any incriminating statements, defendant was told by the sheriff that a telephone was available if he desired to use it, and where the State presented other overwhelming evidence of defendant's guilt, including positive identification of defendant by an eyewitness.

3. Constitutional Law § 32—confinement without appointment of counsel — waiver by defendant

Defendant was not deprived of his constitutional right to the presence of counsel and his rights under G.S. 7A-453 and G.S. 15-47 were not violated by his confinement in jail for eight days without appointment of counsel where defendant told police officers he intended to procure his own attorney through friends in Washington, D. C. and did not want appointed counsel, and when it first became apparent that he was unable to secure such attorney, an attorney was appointed to represent him without further delay.

4. Constitutional Law § 36; Criminal Law § 135— constitutionality of death penalty

Defendant's constitutional and statutory rights were not violated by the imposition of the death penalty upon his conviction of first degree murder.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to the death penalty.

APPEAL by defendant from *Peel, J.*, at the February 1974 Session of BERTIE Superior Court.

On an indictment proper in form, defendant was tried and convicted of the first degree murder of Carlton Woodrow Barham. Defendant appeals from a judgment imposing a sentence of death.

The testimony of Mrs. Nellie Ivy, a witness for the State, tends to show that on Saturday night, 29 September 1973, she was working part-time in Mr. Carlton Woodrow Barham's store just inside the city limits of Roxobel, N. C. She came to work about 5:30 p.m. At about 8:30 p.m., nearing closing time, she and Mr. Barham were alone in the store. She was standing near the cash register. Mr. Barham was proceeding toward the cash register from the back of the store where he had turned off the television. At this time, defendant came into the store with a hat over his hand. He removed the hat, uncovered a pistol, and said, "This is a hold-up. Give me your money." She then told

Mr. Barham, "For the Lord's sake, give it to him." Mr. Barham emptied his cash register and put the money in defendant's hat, saying that was all the money he had. Defendant ordered her and Mr. Barham out from behind the counter so he could check the cash register for himself. Defendant then took the money in the hat, started toward the door, and turned around. She said, "Please don't shoot us," at which time defendant shot at her, hitting her in the stomach. He was seven to ten feet from her and she could see him clearly. Defendant fired another shot over her at Mr. Barham. She heard a total of three shots after the shot that struck her. She also heard Mr. Barham cry out. Defendant then left the store. She waited until she heard a car leave and then dragged herself outside seeking help. She identified the defendant at trial as the man who robbed the store and shot her and Mr. Barham.

An autopsy conducted the following day disclosed that Mr. Barham died from massive hemorrhages in the abdominal area caused by a gunshot wound.

Thomas James Bishop testified that he is a resident of Roxobel and that on the night in question he saw a dark-colored 1963 two-door Chevrolet with an antenna on the right rear run a stoplight at a high rate of speed about a mile down the road from Barham's store. The automobile was proceeding toward Murfreesboro. Bishop and Joe Herman then went down to Barham's store and saw Mrs. Ivy lying in the yard.

Deputy Sheriff Milton Morris testified that, based on Bishop's description of the automobile, the sheriff's office in Bertie County issued an alert at about 9:05 p.m.

Sergeant Robert E. Harris of the Murfreesboro Police Department testified that shortly after receiving the alert, he set up a traffic check at the west end of Murfreesboro. Within a few minutes, a car meeting the above description was sighted. After some hesitation, the driver of the 1963 Chevrolet, who was alone, pulled over to the side of the road in response to Sergeant Harris's blue light and siren. The defendant was the driver. Sergeant Harris noticed that defendant was fumbling at his feet as Harris approached the driver's side of the automobile. Defendant was unable to produce an operator's license and the registration card showed the automobile to belong to one James F. Robertson. As Sergeant Harris was reaching for the registration card, which was located on the dash of the car,

he saw the stock of a pistol protruding from beneath the seat of the automobile. The pistol was a .38-caliber Smith and Wesson revolver with four "spent" cartridges and two "live" cartridges in the chamber.

Sergeant Harris took defendant to the police station in Murfreesboro after giving him his *Miranda* rights. A search there revealed eleven other "live" .38-caliber cartridges in defendant's right pocket and $136 in defendant's left pocket.

Sheriff Edward H. Daniels testified that shortly before 3:00 a.m. on the morning of 30 September 1973, defendant confessed to the robbery and murder after an interrogation of about one hour.

Special Agent Frank Satterfield of the State Bureau of Investigation testified that, in his opinion, the bullets taken from Mr. Barham's body had been fired from the revolver found in the 1963 Chevrolet driven by defendant.

James F. Robertson testified that he was the owner of the 1963 Chevrolet driven by defendant and that it had been missing since the morning of 29 September 1973. He further testified that he did not give anyone permission to drive it and that he never owned a revolver nor kept one in his automobile.

Other law enforcement officers testified at various stages of the trial for corroborative purposes.

Defendant offered no evidence.

Other facts pertinent to decision are set out in the opinion.

Attorney General Robert Morgan and Assistant Attorney General Lester V. Chalmers, Jr., for the State.

William W. Pritchett, Jr., for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that he was deprived of his constitutional right to trial by an impartial jury when the trial judge allowed juror Tilgiham to be dismissed upon challenge for cause by the State. Defendant asserts that Mrs. Tilgiham's objections to the death penalty were general and that she therefore should not have been dismissed for cause, citing *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968).

During *voir dire*, the following transpired between the solicitor and Mrs. Tilgiham:

"Q. And let me ask you this question. If you were satisfied from the evidence and beyond a reasonable doubt, would you vote for a verdict of guilty, realizing at the time you cast that vote that it would take this man's life?

"A. No. It is kind of a hard question about taking a person's life. I would have to think that over. I would hate to do that.

"Q. I am just asking you could you do that?

"A. I could if I . . . you know . . . I would have to think first.

"Q. Ma'am?

"A. Well, I could, you know, but I have . . . it is a hard thought to say what I would say about taking a man's life.

"Q. I am certainly not attempting to do anything except try to find out from you if you could and would do that.

"A. I can't. . . .

"Q. If you were satisfied from the evidence that the defendant was guilty of murder in the first degree, would you vote for a verdict of guilty realizing at the time that it would take his life?

"A. Well, it would be hard to take a person's life. It would be on my conscience.

"Q. I just want you to tell me if you could or could not do that?

"A. No, I don't feel like I could do that.

"Q. Under any circumstances regardless of the facts in any case would you vote for a verdict, in any case that would take this man's life?

"A. I wouldn't like to vote to take his life if I could help it.

"Q. Well, are you opposed under all circumstances and conditions to capital punishment?

"A. On the punishment, yes.

"Q. I said are you opposed to capital punishment?

"A. Well, yes.

"Q. You are?

"A. I think so as far as I know of taking his life.

"Q. Your Honor, I submit this woman for cause.

"COURT: All right. You may step down."

Since *Witherspoon*, this Court has consistently held that if a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Anderson*, 281 N.C. 261, 188 S.E. 2d 336 (1972); *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289 (1972); *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Westbrook*, 279 N.C. 18, 181 S.E. 2d 572 (1971), modified on other grounds, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), modified on other grounds, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971).

Whether a juror evidences absolute opposition to the death penalty so as to be excludable for cause under *Witherspoon* is a difficult question subject to seemingly inconsistent results on similar facts. See Annot., 39 A.L.R. 3d 550 (1971). We are aware of numerous decisions in other jurisdictions upholding challenges for cause on answers more equivocal than those of juror Tilgiham. *See, e.g., Paramore v. State*, 229 So. 2d 855 (Fla. 1969), modified on other grounds, 408 U.S. 935, 33 L.Ed. 2d 751, 92 S.Ct. 2857 (1972); *Williams v. State*, 228 So. 2d 377 (Fla. 1969), modified on other grounds, 408 U.S. 941, 33 L.Ed. 2d 765, 92 S.Ct. 2864 (1972); *State v. Conyers*, 58 N.J. 123, 275 A. 2d 721 (1971); *State v. Elliott*, 25 Ohio St. 2d 249, 54 Ohio Ops. 2d 371, 267 N.E. 2d 806 (1971), modified on other grounds, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2872 (1972); *Koonce v. State*, 456 P. 2d 549 (Okla. Crim. 1969), modified

on other grounds, 408 U.S. 934, 33 L.Ed. 2d 748, 92 S.Ct. 2845 (1972); *Tezeno v. State*, 484 S.W. 2d 374 (Tex. 1972). We are also aware that a substantial number of death penalty cases have been reversed on the authority of *Witherspoon* in memorandum opinions by the United States Supreme Court. For a partial list, see *Tezeno, id.* at 383.

In *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), we held that a prospective juror, Mrs. Rogers, was properly excused for cause after answering questions concerning her belief as to capital punishment as follows:

> "'MR. PIERCE [the solicitor]: And Mrs. Rogers, let me ask you the same question, that I have been asking. Would it be impossible for you to bring in a verdict requiring the imposition of the death penalty, under any circumstances, no matter—even though the State proved to you the defendant's guilt beyond a reasonable doubt?
>
> JUROR ROGERS: I do not believe in capital punishment.
>
> MR. PIERCE: Let me ask you this question, again, with your answer in mind, please. Would it be impossible to bring in a verdict that required the imposition of the death penalty, no matter what the State showed you, by way of the evidence?
>
> JUROR ROGERS: I think so.'"

While it is clear that Mrs. Tilgiham, the prospective juror in this case, encountered some difficulty formulating answers to the questions, the solicitor was diligent in seeking to help the juror clarify her position. The solicitor stated that he was seeking by his questions only to find out, under *Witherspoon*, if the juror could or could not render a guilty verdict, the consequences of which would be death to the defendant. We believe the juror clarified her position to the extent that it was clear that she would refuse to return a guilty verdict regardless of the evidence. This is shown by her other answers, as well as by the following exchange:

> "Q. If you were satisfied from the evidence that the defendant was guilty of murder in the first degree, would you vote for a verdict of guilty realizing at the time that it would take his life?
>
> "A. Well, it would be hard to take a person's life. It would be on my conscience.

"Q. I just want you to tell me if you could or could not do that?

"A. No, I don't feel like I could do that."

As the Texas Court of Criminal Appeals said in *Tezeno:*

> "We cannot believe that *Witherspoon* . . . requires certain formal answers and none other. We surely feel that the test of *Witherspoon* is 'not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. [Citation omitted.]' " 484 S.W. 2d at 383.

We think that, reading the juror's answers as a whole, she displayed an unequivocal reluctance to render a guilty verdict, knowing that defendant would be subjected to the death penalty. Furthermore, the record does not disclose that the State had exhausted its nine peremptory challenges, and had this challenge for cause not been sustained, the solicitor could have challenged this juror peremptorily.

This assignment is overruled.

Defendant next contends that the trial court erred in allowing into evidence the defendant's in-custody confession.

A *voir dire* hearing was held to determine the admissibility of the confession. On *voir dire,* Special Agent William Earl Godley of the State Bureau of Investigation testified that he read the defendant his rights at the Murfreesboro Police Station as follows:

> "Before I ask you any questions, you must understand your rights. You have the right to remain silent and not make any statement. Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice before you answer any questions and to have him or anyone else with you during questioning. If you cannot afford a lawyer, one will be appointed for you by the Court before any questioning, if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer."

Defendant, a high school graduate, testified on *voir dire* that he had been taken into custody three times before and that

he understood his rights. He signed a written waiver of those rights at about 1:55 a.m. Defendant testified that "nobody mistreated me," that he knew and understood his rights, and that he had a Coca-Cola and was allowed to smoke. After a thorough *voir dire* hearing, covering eleven pages in the record, the trial court concluded that the defendant freely, understandingly and voluntarily made the statement to Sheriff Daniels without undue influence, compulsion and duress and without promise of leniency, and that defendant's constitutional rights had not been abridged in any way. Such conclusions, when supported by competent evidence, are conclusive on appeal. *State v. Thompson*, 285 N.C. 181, 203 S.E. 2d 781 (1974); *State v. Crews*, 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969).

[2] Defendant earnestly contends, however, that the confession was rendered incompetent due to an incident which occurred between him and Police Chief Wheeler earlier in the evening on 29 September at the police station.

Upon being arrested and placed in the police car around 9:15 p.m., defendant was read his rights. After arriving at the station, defendant asked to make a telephone call. Police Chief Wheeler told defendant he could make the telephone call after he gave the officers his name, date of birth and address. Defendant refused to give that information and was not allowed to make a telephone call at that time. Chief Wheeler testified that he needed the name of the defendant so he could complete his legal papers, draw a warrant promptly (as required by G.S. 15-47), and keep his phone log up to date as required by city regulations. He further testified: "The city requires me to make a log of each call that is made and who makes the call. If he had told me who he was, I would have let him make the call. I did not try to keep him from making the call but I had to know who he was going to call so I could log it." The information sought by Chief Wheeler was harmless to defendant yet necessary to the police in performing clerical duties accompanying arrest.

Later that night Sheriff Daniels of Bertie County took charge of the investigation. Sheriff Daniels recognized defendant as being one of the Avery boys from Lewiston whom he had arrested before. The sheriff was present when defendant

was advised of his rights by Agent Godley and when defendant signed the waiver of those rights. After the waiver was signed, Agent Godley left and Sheriff Daniels, after again reminding defendant of his rights, asked him if it would be all right if he talked to him without a lawyer being present. Defendant replied that this would be all right. Defendant did not request to use the telephone that night although the sheriff told him that there was a telephone available if there was anyone he wanted to call. Under these facts, we do not feel that the refusal of Chief Wheeler to allow defendant to make a phone call until he gave the officer his name, date of birth and address was such prejudicial error, if error, as to require a new trial. Especially so when shortly thereafter, and before making any incriminating statement, defendant was told by the sheriff that a telephone was available if he desired to use it. At that time defendant did not request to make a telephone call but told the sheriff he did not want an attorney or anyone else present at that time and if he decided to get an attorney he would get one himself later on.

Assuming, without deciding, that it was error for Chief Wheeler to refuse to let defendant make the telephone call when he first requested to do so, we believe that under the facts in this case it, at most, would be harmless error. As stated in *State v. Taylor*, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972):

> "Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824, 24 A.L.R. 3d 1065 (1967); *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969). Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963)."

In the present case defendant was positively identified by Mrs. Ivy who was present and who was also shot by defendant and who saw defendant shoot deceased. A car was seen leaving the vicinity of the shooting at a high rate of speed shortly after the shooting occurred. Soon thereafter, a car of the same description being driven by the defendant was stopped. A pistol was found in the car with four spent cartridges and two live ones.

Mrs. Ivy testified that three shots were fired after the one which struck her. A ballistics expert testified that the bullets which killed deceased were fired from the pistol found in defendant's possession in the car stolen from Mr. Robertson. Eleven live cartridges for the same caliber pistol and $136 in cash were found in defendant's pockets. A hat similar to the one which defendant had over the pistol when he first entered the store was also found in the car which defendant was driving. In view of this overwhelming evidence of defendant's guilt, we hold that the failure to allow defendant to make the telephone call as first requested, when he was allowed the opportunity to do so shortly thereafter, and before making any incriminating statement, was harmless beyond a reasonable doubt. We do not believe there is a reasonable possibility that this failure contributed to defendant's conviction. *See State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974); *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973).

[3] Defendant next contends that his constitutional and statutory rights were violated by virtue of his being confined in jail for eight days without appointment of counsel.

Defendant was arrested about 9:15 p.m. on 29 September 1973. He was taken to the Murfreesboro Police Department where he signed a written waiver of his rights at about 1:55 a.m. He made a full confession about 3:00 a.m. on 30 September. Counsel was appointed for defendant in District Court on 8 October 1973. Sheriff Daniels testified on *voir dire* that at no time during the week preceding 8 October did defendant request that counsel be appointed for him. Daniels further testified that defendant told him that he could get his own attorney through connections he had in Washington, D. C. Defendant testified on cross-examination during *voir dire* that he told police officers he could get his own attorney and that he did not want appointed counsel. He testified that he told officers this on Monday, Tuesday and Wednesday, following his confession on Sunday morning, and that he was given appointed counsel as soon as he discovered he could not employ his own attorney. This contention is without merit.

Defendant asserts that he was deprived of his constitutional right to the presence of counsel during these eight days, and cites *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971), and *State v. Pearce*, 266 N.C. 234, 145 S.E. 2d 918 (1966), in

support of his argument. Defendant's reliance is misplaced. In *Hill*, defendant was held to be unconstitutionally deprived of his right to counsel when his counsel, who had been summoned, was refused permission to see him. In this case, defendant was offered an opportunity to contact counsel, and he assured the officers he would seek his own counsel to assist him. In *Pearce*, defendant was held for two months before counsel was appointed, during which the officers elicited much damaging testimony from him. In that case, lack of presence of counsel was but one factor among several which induced this Court to rule the admissions of defendant to be involuntary. At no time in that case did the defendant assure the officers he would procure his own counsel. In the present case defendant continued to assure the officers that he intended to employ private counsel. Under these circumstances, we hold that defendant's constitutional rights were not violated by the eight days' delay in appointment of counsel.

Defendant contends specifically, however, that his rights under G.S. 7A-453 and G.S. 15-47 were violated by the eight days' delay in appointing counsel for him. Pertinent parts of those statutes are as follows:

> "G.S. 7A-453. *Duty of custodian of a possibly indigent person; determination of indigency.*— . . . .
>
> "(b) In districts which do not have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court. The clerk shall make a preliminary determination as to the person's entitlement to counsel and so inform any district or superior court judge holding court in the county. The judge so informed may assign counsel. The court shall make the final determination.
>
> "(c) In any district, if a defendant, upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the defender or the clerk of superior court, as the case may be, who shall take action as provided in this section.
>
> "(d) The duties imposed by this section upon authorities having custody of persons who may be indigent are in addition to the duties imposed upon arresting officers under G.S. 15-47."

"G.S. 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.*— . . . [A]nd it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied." (Repealed by Chapter 1286, Session Laws 1973, effective July 1, 1975.)

In this case, all the evidence is to the effect that defendant told the officers he intended to procure his own attorney through friends in Washington, D. C. He continued to tell the officers this for several days after his arrest. When it first became apparent that he was unable to secure such attorney, an attorney was appointed to represent him without further delay. As stated in *State v. McCloud*, 276 N.C. 518, 531, 173 S.E. 2d 753, 763 (1970):

"The failure to observe the provisions of these statutes may well result in the violation of a person's constitutional rights. However, G.S. 15-46 and G.S. 15-47 do not prescribe mandatory procedures affecting the validity of a trial. *State v. Broome*, 269 N.C. 661, 153 S.E. 2d 384; *Carroll v. Turner*, 262 F. Supp. 486 (E.D.N.C. 1966)."

Defendant, both by words and acts, waived his right to earlier appointment of counsel. No violation of the quoted statutes is shown. This assignment is overruled.

[4] Defendant finally contends that his constitutional and statutory rights were violated by the imposition of the death penalty. The defendant's contentions with respect to the validity of the death sentence have been carefully considered and found to be without merit by this Court in a number of recent decisions. *State v. Noell, supra; State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19 (1973). No useful purpose would be served by further discussion here. This assignment is overruled.

In view of the seriousness of the charge and gravity of the punishment imposed, we have carefuly examined each of defendant's assignments of error. An examination of the entire record

discloses that the defendant has had a fair trial free from prejudicial error.

No error.

Chief Justice SHARP dissenting as to the death penalty:

The murder for which defendant was convicted occurred on 29 September 1973, a date between 18 January 1973, the day of the decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in *State v. Jarrette*, 284 N.C. 625, 656, 202 S.E. 2d 721, 747 (1974)—an opinion in which Justice Higgins and I joined—, I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissenting opinion of Chief Jusice Bobbitt, and my concurrence therein, in *State v. Waddell, supra* at 453 and 476, 194 S.E. 2d at 30 and 47.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion filed this day in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. LAWRENCE McCALL

No. 32

(Filed 12 March 1975)

1. Homicide § 21 — death by shooting — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a first degree murder prosecution where it tended to show that the victims